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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 510

SANTO R. SGARLATO, JR.,
Petitioner,

v.

SOLOMON O. KLEIN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

MORTON LIFTIN
818 – 18th Street, N.W.
Washington, D.C. 20006
Attorney for Petitioner

INDEX

OPINION BELOW 2
JURISDICTION 2
QUESTIONS PRESENTED 2
CONSTITUTIONAL PROVISIONS INVOLVED 2
STATEMENT OF CASE 3
REASONS FOR GRANTING THE WRIT 6
CONCLUSION 12
APPENDIX 13

TABLE OF CASES

Boyd v. United States, 116 U.S. 616 ..... 6, 7, 8, 11
Cohen v. Hurley, 366 U.S. 177 ..... 3, 4, 5, 8
Cummings v. Missouri, 4 Wall. 277, 327 9
Elkins v. United States, 364 U.S. 206 12
Ex Parte Garland, 4 Wall. 333, 377 ..... 7, 9
Federal Trade Commission v. American Tobacco Company, 264 U.S. 298 ..... 7, 12
Gardner v. Broderick, 392 U.S. 273 ..... 6, 10
Garrity v. New Jersey, 385 U.S. 493 ..... 6, 7, 10
Hale v. Henkel, 201 U.S. 43 12
In Re Ruffalo, 390 U.S. 544 9
In Re Ungar, 27 A.D. 2d 925, 282 N.Y.S. 2d 158 (1st Dept., 1967) 7
Knoll Associates, Inc. v. Federal Trade Commission, 396 F.2d __ (1968 Trade Cases 72, 494, C.A. 7, decided June 18, 1968) 12
Lees v. United States, 150 U.S. 476 8
Mapp v. Ohio, 367 U.S. 643 ..... 7, 12
Oklahoma Press Publishing Company v. Walling, 327 U.S. 186 11

Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 701 8

See v. City of Seattle, 387 U.S. 541, 544 ..... 11, 12

Spevack v. Klein, 385 U.S. 511 ..... 5, 6, 8, 10, 11

Ullmann v. United States, 350 U.S. 422, 431 ..... 7, 8

Uniformed Sanitation Men v. Commission of Sanitation, 392 U.S. 280 ..... 6, 7

United States v. Bausch and Lomb Optical Company, 321 U.S. 707 11

United States v. Brown, 381 U.S. 437 9

United States v. Lovett, 328 U.S. 303, 316 9

United States v. Morton Salt Company, 338 U.S. 632 11

Zuckerman v. Greason, 20 N.Y.2d 430, 438, 285 N.Y.S.2d 1, 6 (1967) 6, 7

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No.

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York entered on June 14, 1968, affirming the order of the Appellate Division, Second Department, of the Supreme Court of the State of New York, dated February 17, 1967, suspending petitioner from the practice of law for a period of two years.

OPINIONS BELOW

The Court of Appeals wrote no opinion. The opinion of the Appellate Division is reported at 27 A.D.2nd 738, 277 N.Y.S.2nd 318.

JURISDICTION

The jurisdiction of this court is invoked under 28 U.S.C. 1257 (3). The judgment of the Court of Appeals was entered on June 14, 1968.

QUESTIONS PRESENTED

1. Whether the Fifth Amendment Privilege against self-incrimination, as applied to state action through the Fourteenth Amendment, forbids the use in judicial disciplinary proceedings with respect to an attorney, of inculpatory evidence obtained from the attorney by the coercive threat of disbarment if he refused to furnish the incriminating evidence.

2. Whether the Fourth Amendment, as applied to state action through the Fourteenth Amendment, prohibits the use in judicial disciplinary proceedings with respect to an attorney, of evidence contained in the attorney's testimony and private papers, or the fruits thereof, obtained from the attorney by an unconstitutional threat of disbarment if he refused to provide the testimony and furnish the private papers or as the result of an unconstitutionally broad demand for private papers.

CONSTITUTIONAL PROVISIONS INVOLVED

UNITED STATES CONSTITUTION, AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, . . .

UNITED STATES CONSTITUTION, AMENDMENT V

No person . . . shall be compelled in any criminal case to be a witness against himself . . .

UNITED STATES CONSTITUTION, AMENDMENT XIV

Section 1 . . . nor shall any State deprive any person of life, liberty or property without due process of law; . . .

STATEMENT OF CASE

Petitioner was admitted to practice as an attorney and counselor at law in the State of New York on October 19, 1955. Almost nine years ago, on November 5, 1959, in response to subpoenas, petitioner appeared as a witness before the Judicial Inquiry, established by order of the Appellate Division to investigate professional conduct, and refused to answer questions and to produce records in reliance on the Fifth Amendment privilege against self-incrimination because of the possibility of criminal prosecution. Following this Court's decision in *Cohen v. Hurley*, 366 U.S. 117, the Judicial Inquiry by letter of October 24, 1961, advised petitioner of this Court's affirmance of the "decision disbarring Albert Martin Cohen for his refusal to answer pertinent questions before the Additional Special Term, albeit Mr. Cohen likewise based this refusal on the grounds of self-incrimination." He was further advised that "Mr. Justice Baker is prepared to accord you another opportunity to testify."

The Judicial Inquiry had received no complaints concerning petitioner and was making inquiry with respect to no specific matters. It was conducting a general investigation of petitioner's practice and requested him to "bring with you all financial records pertinent to your practice of law as described in the subpoena duces tecum served upon you." A subpoena directed him to produce all conceivable financial records pertaining to his practice as an attorney from the day he was admitted to the bar to the time of the investigation. He was also informed that subsequently he

would be asked to produce certain of the legal files relating to his cases and was, in fact, requested to furnish more than 200 clients' files. Under the implied threat of disbarment for failure to comply embodied in the reference to *Cohen v. Hurley, supra,* petitioner appeared before the Judicial Inquiry on November 2, 1961, with the records demanded and thereafter testified and produced the financial records and clients' files requested.

Disciplinary proceedings were instituted against petitioner in November 1964 by a petition which set forth 29 charges of alleged misconduct some of which could have subjected petitioner to criminal prosecution. Petitioner denied all the charges except one relating to failure to maintain a separate account for clients' funds. Extensive hearings were held before Justice Nicholas M. Pette, a Justice of the Supreme Court of the State of New York to whom the disciplinary proceeding had been referred for hearing and a report of his findings on the issues. Petitioner was called as a witness and his testimony before the Judicial Inquiry and the records he produced under threat of disbarment were introduced in evidence (Tr. 152). This evidence and his testimony at the hearing provided a substantial amount of the proof offered in support of the charges (Tr. 153-207, 345-359, 591-739, 757-878, 1001-1123). Virtually all the proof was derived from petitioner's compelled disclosures and production.

Justice Pette's report, dated April 12, 1966, found seven of the 29 charges sustained and the remaining charges not sustained. In concluding his report, Justice Pette observed that petitioner "was a popular young neighborhood lawyer in whom his clients apparently had faith and confidence" and "that no complaint was ever made by them" (Report, p. 68). He remarked that petitioner "committed many of the offenses charged due to his inexperience and ignorance" and commented that "the mass of specifications and extensive hearings have yielded but several charges which have been sustained". He further noted that petitioner "has dem-

onstrated that he has a potential future useful service to the public and the bar" (Report, pp. 68-69).

On February 14, 1967, on cross-motions to confirm and disaffirm Justice Pette's Report, the Appellate Division held that eight additional charges had been sustained. Its accompanying opinion recited: "In mitigation of the discipline to be imposed upon respondent [petitioner], we have considered the absence of any complaints by his clients, the fact that almost all the proved misconduct occurred prior to 1960, and the absence of any charges in the intervening years." Petitioner was ordered suspended from the practice of law for a period of two years commencing March 6, 1967.

On April 10, 1967, petitioner moved for reargument of the order of suspension and, alternatively, for leave to appeal to the Court of Appeals. The motions were predicated on the claim that "the order of suspension is void under the United States Constitution in that it is indispensably derived from and based upon evidence obtained in violation of my privilege against self-incrimination under the Fifth and Fourteenth Amendments." Petitioner cited and relied upon this Court's decision a few months earlier in *Spevack v. Klein*, 385 U.S. 511, which overruled *Cohen v. Hurley*, 366 U.S. 117. On the same day, April 10, 1967, petitioner also appealed as of right to the Court of Appeals on the ground that a constitutional question under the Fifth and Fourteenth Amendments was directly involved. By order of July 10, 1967, the Appellate Division denied reargument but granted petitioner leave to appeal certifying that "questions of law have arisen which in its opinion ought to be reviewed by the Court of Appeals."

On June 14, 1968, the Court of Appeals, without opinion, affirmed the order of the Appellate Division. The remittitur of the cause by the Court of Appeals to the Appellate Division, as amended, recited that on appeal there was presented and necessarily passed upon the question of whether petitioner "was deprived of due process in violation of the Fifth and Fourteenth Amendments to the Con-

stitution of the United States in that there were introduced against him in this disciplinary proceeding statements elicited from him under threat of disbarment if he did not make such statements. The Court of Appeals held that there was no violation of appellant's [petitioner's] constitutional rights."

REASONS FOR GRANTING THE WRIT

Spevack v. Klein, 385 U.S. 511, established that an attorney may not be disbarred for his refusal to furnish records and information relating to his practice of law in reliance on the privilege against self-incrimination. See also *Uniformed Sanitation Men v. Commission of Sanitation*, 392 U.S. 280; *Gardner v. Broderick*, 392 U.S. 273. Petitioner, under threat of disbarment for failure to do so, complied with a request by the Judicial Inquiry for information and records. The evidence compelled by threat of disbarment was the basis of subsequent disciplinary proceedings against him resulting in the suspension order of February 14, 1967, which is the subject of this petition. Clearly, this compelled testimony could not have been used against petitioner in a criminal prosecution (*Garrity v. New Jersey*, 385 U.S. 493) or in a proceeding for forfeiture of his property. *Boyd v. United States*, 116 U.S. 616. The New York Court of Appeals has recently held that attorneys "had no privilege against making disclosures usable only in a disciplinary proceeding. The Constitutional privilege applies only in the case of evidence which might be used against them in a criminal case under the language of the Fifth Amendment." *Zuckerman v. Greason*, 20 N.Y.2d 430, 438, 285 N.Y.S.2d 1, 6 (1967). Obviously, this holding determined the Court of Appeals' rejection of petitioner's claim of a violation of his rights under the Fifth and Fourteenth Amendments.

The New York Court of Appeals has thus decided in the present case that evidence coerced by threat of disbarment may be used against an attorney in a disciplinary pro-

ceeding. This is a question of substance under the Fifth Amendment which has not heretofore been determined by this Court and deserves the Court's consideration because the decision below appears inconsistent with the decisions of this Court that the forfeiture of property is a criminal case under the Fifth Amendment *(Boyd v. United States, supra)* and that denial of the right to practice law is punishment under the bill of attainder prohibitions of the Constitution. *Ex parte Garland,* 4 Wall. 333,377. The case also involves the closely related question whether the coercive nature of the Judicial Inquiry's demand (*Boyd v. United States, supra)* or its broad scope *(Federal Trade Commission v. American Tobacco Company,* 264 U.S. 298) constituted an unreasonable search under the Fourth Amendment which which brought into play the exclusionary rule held applicable to the States in *Mapp v. Ohio,* 367 U.S. 643.

1. Petitioner's claim of a violation of the privilege against self-incrimination rests on the contention that the suspension of an attorney from the practice of law is within the protection of the privilege because it is the equivalent of a criminal penalty and that the use in the disciplinary proceeding of incriminating evidence compelled by threat of disbarment constituted an invasion of the privilege. The holding of the Court of Appeals that there was no violation of petitioner's constitutional rights is presumably based upon the rationale that a disbarment proceeding is not a "criminal case" within the meaning of the privilege against self-incrimination. *Zuckerman v. Greason,* 20 N.Y.2d 430; 285 N.Y.S.2d 1 (1967); *In re Ungar,* 27 A.D.2d 925, 282 N.Y.S.2d 158 (1st Dept., 1967).

If suspension from the bar is a criminal penalty, the Fifth Amendment precludes the use of coerced testimony in the disciplinary proceeding. The compulsion of incriminating testimony generates an immunity from sanctions which are "criminal in nature" *(Ullmann v. United States,* 350 U.S. 422, 431) whether or not the immunity is contemplated when the testimony is compelled. *Garrity v. New Jersey,*

385 U.S. 493. Consequently, after petitioner invoked his privilege against self-incrimination, compelling him to testify under threat of disbarment barred the use of this testimony in any proceeding which might result in the imposition of a penalty of a criminal nature. In *Ullmann v. United States, supra,* where the constitutionality of an immunity statute was assailed on the ground that the testimony compelled might result in disqualification from federal employment and other disabilities, the Court stated that a witness who is compelled to answer under the protection of immunity "has, of course, when a particular sanction is so sought to be imposed against him, the right to claim that it is criminal in nature." 350 U.S. at 431. The use of compelled testimony in the present case, therefore, squarely poses the question whether a disciplinary proceeding is a "criminal case" within the meaning of the Fifth Amendment's prohibition against compelled, self-incriminating testimony.

There is formidable authority in the decisions of this Court for the view that, for self-incrimination purposes, a disciplinary proceeding is criminal in nature. *Boyd v. United States,* 116 U.S. 616; *Lees v. United States,* 150 U.S. 476; cf. *Plymouth Sedan v. Pennsylvania,* 380 U.S. 693, 701. Certainly, the loss of one's right to practice his profession, whether temporary or permanent, is no less a criminal penalty than the forfeiture of property involved in the *Boyd* case. The continued vitality of the *Boyd* case was underscored by the reaffirmation in *Spevack v. Klein* "of the broad protection given the privilege" in *Boyd v. United States, supra.* In *Boyd* "compulsory production of books and papers of the owner of goods sought to be forfeited was held to be compelling him to be a witness against himself" (385 U.S. at 515). The *Lees* and *Plymouth Sedan* cases also involved property forfeitures. The dissenting opinions in *Cohen v. Hurley,* 366 U.S. 117, overruled in *Spevack v. Klein,* 385 U.S. 511, expounded the views that the effects of disbarment were so severe as to entitle a lawyer to "the full benefit of the 'law of the land'" (366 U.S. at 147) and that "taking away a man's right to

practice law is imposing a penalty as severe as a criminal sanction" (366 U.S. at 153-154). Although disbarment has a more severe effect on the attorney involved than suspension, suspension is more clearly imposed as punishment. The purpose of disbarment may be to protect the public from an unfit practitioner. Suspension for a two-year period, however, acknowledges that the attorney is not unfit to practice law by recognizing him as a suitable practitioner after expiration of the suspension period. The suspension is obviously punishment for misconduct.

Denial of the right to engage in the practice of law or in other occupations has been held similar to a criminal penalty for the purpose of other constitutional provisions. An attorney has been held "entitled to procedural due process, which includes fair notice of the charge" in disciplinary proceedings because they "are proceedings of a quasi-criminal nature" and disqualification from practice "is a punishment or penalty imposed on the lawyer." *In Re Ruffalo,* 390 U.S. 544. Disqualification from the practice of law, as well as the pursuit of other vocations, has been regarded as punishment for purposes of the Constitution's bill of attainder and ex post facto prohibitions. *Ex Parte Garland,* 4 Wall. 333, 377 (Legislative denial of an attorney's right to practice "for past conduct can be regarded in no other light than as punishment for such conduct"); *Cummings v. Missouri,* 4 Wall. 277, 327 ("This deprivation [of right to pursue regular avocations] is punishment"); *United States v. Lovett,* 328 U.S. 303, 316 ("permanent proscription from any opportunity to serve the Government is punishment"); *United States v. Brown,* 381 U.S. 437 (Disqualification from holding union office held punishment). No reason is readily apparent why disqualification from practicing law, which has been regarded as a criminal penalty for the purpose of other constitutional safeguards, should not similarly be regarded as criminal punishment for purposes of the privilege against self-incrimination. The question whether disciplinary action against attorneys is within the protection of the privilege, therefore, warrants review by this Court.

The importance of determining whether a disciplinary proceeding is a criminal case for purposes of the privilege is accentuated by the interpretation of the Court's recent decisions in *Uniformed Sanitation Men v. Commissioner of Sanitation*, 392 U.S. 280 and *Gardner v. Broderick*, 392 U.S. 273, as indicating that attorneys may be compelled, absent the possibility of criminal prosecution, to provide information that may lead to their disqualification from practice. The opinion of the Court by Mr. Justice Fortas in the *Gardner* case (p. 278) acknowledged that if "a policeman had refused to answer questions specifically, directly, and narrowly relating to the performance of his official duties, without being required to waive his immunity with respect to the use of his answers or the fruits thereof in a criminal prosecution of himself, *Garrity v. New Jersey, supra*, the privilege against self-incrimination would not have been a bar to his dismissal." Mr. Justice Harlan, however, apparently derives from this the conclusion that an attorney similarly may be disbarred, notwithstanding the decision in *Spevack v. Klein, supra*, for refusing to answer questions concerning the practice of his profession. In a concurring opinion, joined by Mr. Justice Stewart, he finds in the *Gardner and Uniformed Sanitation* cases "a procedural formula whereby" lawyers may be "disciplined for refusing to divulge to appropriate authority information pertinent to the faithful performance of their offices" (392 U.S. at 285). Obviously, if lawyers may be punished for refusing to disclose information that may lead to disciplinary action, such punishment is not within the protection of the privilege. Mr. Justice Fortas, however, expressly differentiated the situation of a public official from that of a lawyer, thereby suggesting that, even absent the possibility of criminal prosecution, the lawyer may not be disciplined for refusing to provide information concerning his law practice presumably because disciplinary proceedings are within the scope of the privilege. The desirability of a dispositive decision of this Court to resolve any doubt on the important constitutional question whether the privilege applies to

the penalty of disqualification from the practice of law seems apparent.

2. The compulsory production of petitioner's testimony and private papers under an unconstitutional threat of disbarment and the dragnet demand for all petitioner's financial records and virtually all his client's files constituted an illegal search and seizure under the Fourth Amendment.[1]

A. *Spevack v. Klein, supra,* decided that a lawyer cannot be disbarred because of his refusal to testify at a disciplinary investigation in reliance on the privilege against self-incrimination. Petitioner, however, under threat of disbarment in violation of his constitutional rights, was compelled to forego the privilege and supply inculpatory records and information. The fruits of this unconstitutional compulsion were the basis for his suspension. *Boyd v. United States, supra,* held that "a compulsory production of a man's private papers to establish a criminal charge against him or to forfeit his property is within the scope of the Fourth Amendment" (116 U.S. at 622). Coerced production for disciplinary purpose would appear similarly to be within its scope.

B. The all encompassing scope of the Judicial Inquiry's demand for petitioner's financial records and other files violated the Fourth Amendment requirement that a demand "be sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome." *See v. City of Seattle,* 387 U.S. 541, 544. See also *United States v. Morton Salt Company,* 338 U.S. 632; *Oklahoma Press Publishing Company v. Walling,* 327 U.S. 186; *United States v. Bausch and Lomb Optical*

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[1] Petitioner did not raise a Fourth Amendment question in the proceedings below. Because of the close connection between the concepts embodied in the Fourth and Fifth Amendments (*Boyd v. United States, supra; Mapp v. Ohio, supra),* however, the court may wish to consider petitioner's constitutional claim in terms of the Fourth, as well as the Fifth, Amendment.

Company, 321 U.S. 707; *Hale v. Henkel*, 201 U.S. 43. Fishing expeditions into private papers in the hope of finding some transgression are not countenanced by the Fourth Amendment. *Federal Trade Commission v. American Tobacco Company*, 264 U.S. 298.

C. The exclusionary rule with respect to evidence obtained by an unreasonable search was held applicable to state proceedings in *Mapp v. Ohio*, 367 U.S. 643. The Fourth Amendment has been held applicable to administrative investigations (see, e.g. *See v. City of Seattle, supra*), and the policy of the exclusionary rule to discourage violation of the constitutional protection would seem to preclude the State's use of evidence obtained in violation of the Fourth Amendment in a civil or quasi-criminal, as well as a criminal, proceeding. See *Mapp v. Ohio, supra; Elkins v. United States*, 364 U.S. 206. Evidence tainted by an unreasonable search has been held by a Court of Appeals inadmissible in an administrative proceeding which resulted in a cease and desist order. *Knoll Associates, Inc. v. Federal Trade Commission*, 396 F.2d __ (1968 Trade Cases 72, 494, C.A. 7, decided June 18, 1968). The same policy should preclude use in disciplinary proceedings of the product of the constitutional invasion to the detriment of the person whose constitutional privilege was violated. The present case thus presents a question of important constitutional dimensions under the Fourth, as well as the Fifth Amendment.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

MORTON LIFTIN
818 – 18th Street, N.W.
Washington, D.C, 20006
Attorney for Petitioner